>> THE NEW RULE ON ROBBERY IN KENTUCKY

The Kentucky Supreme Court, while discussing briefly some prior case law holding that the two crimes of Robbery and Theft were mutually exclusive, rested its decision on what it describes as the legislature's "sufficient indicia of intent to prohibit convictions for both first-degree robbery and felony theft arising from one underlying theft."

> First, the General Assembly chose to use prominently the word *theft* in KRS 515.020, the applicable robbery statute. Specifically, KRS 515.020(1) provides that a person commits first-degree robbery when 'in the course of committing theft….' The use of the specific word *theft* in both the robbery statute and in the theft by unlawful taking statute is surely not coincidental. We believe that the use of the same term in both statutes evinces the General Assembly's intent to define robbery as being theft plus the additional element of force or threatened force.
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> This conclusion is readily reinforced by the previously mentioned commentary to KRS 515.020, which provides, in relevant part, that 'all of the elements of the crime of theft as set forth in KRS 514.030 are incorporated into this offense.' We believe that commentary, which, of course, may be used as an aid in construing the statutes of the penal code, represents an unmistakable expression of intent for theft by unlawful taking to be subsumed into robbery. It would be a clear violation of legislative intent, therefore, for a person such as Lloyd to be convicted of both theft by unlawful taking and robbery based upon the same incident of theft. *Id.*, at 10-11.

Because the Court found this clear intent of the legislature, the Blockburger standard is no longer to be applied for robbery and theft charges in Kentucky. The Kentucky Revised Statutes themselves, however, contain no black letter language requiring a conviction of one or the other crime. In addition, prosecutors and judges for years have applied the Blockburger standard to theft and robbery, presenting both in jury instructions as convictable crimes, rather than the either/or approach required after the Court's discovery of the legislature's intent in Lloyd.

WHERE DO WE GO FROM HERE?

So, what is the practical effect for prosecutors and officers making charging decisions in light of Lloyd v. Commonwealth? Prosecutors and law enforcement officers faced with an accused robber must charge him only with robbery. Theft can no longer be an additional charge unless a separate something was stolen other than that which was the subject of the robbery. Such a situation might, however, require a severance of the charges for trial.

At trial, the commonwealth must do what seems like the opposite of its duties at charging. Since theft is a lesser included offense of robbery, theft must be included as a lesser included offense in jury instructions every time robbery is charged. At trial then, jurors can choose to find the defendant committed the lesser included offense of theft rather than the robbery. Failure to do as instructed in Lloyd will result in the case returning on appeal for retrial for improper jury instructions. Future prosecutors may not be as fortunate as in Lloyd, in which the Court upheld the defendant's robbery conviction and ordered the trial court to dismiss the theft charge and enter a new final judgment based solely upon the robbery conviction. Absent a change in the statutory language, the Lloyd decision will be with the courts for some time to come.

For prosecutors and law enforcement investigators, the job is not so much to change the law to suit a vision of what is just, as to be able to apply the law as it exists. Reliability in these professions, more often than not, beats out ingenuity every time. In that vein, the Lloyd decision is helpful, as it gives clear guidance to officials seeking to enforce the law and punish those who commit robberies in the commonwealth. Applying Lloyd correctly to charging decisions, and later in drafting jury instructions, will lead to solid convictions that keep robbery defendants where they belong — in jail.